minimum point of entry,[440] (3) at the point where the wiring loop connects to the common feeder line,[441] or (4) at the wall plate in each apartment.[442]

158. Some commenters argue that the Commission should prohibit future installations of loop-through wiring in order to promote competition,[443] while others claim that loop-through wiring configurations are often necessary in order to provide any video service, or that the Commission does not have the authority to prohibit its use.[444] GTE asserts that the only solution is to deregulate rates for home wiring and give subscribers immediate pre-termination rights. GTE contends that after deregulation the building owner would have control over all existing loop-through inside wiring.[445]

2. Discussion

159. As with other cable inside wiring configurations in MDUs, a wiring loop may include both wiring inside the individual dwelling unit and wiring in common areas which extends outside the individual dwelling unit to the riser or feeder cable. We believe that, for purposes of our cable inside wiring rules, all loop-through wiring should not be treated the same. We therefore conclude that, when the property owner or the entity that owns or controls the common areas elects to switch to a new service provider, our cable home wiring rules will apply to that portion of the loop-through wiring that is inside the individual dwelling unit (up to the demarcation point(s) discussed below). For example, when an MDU owner wishes to terminate service for a building with loop-through wiring and invokes our building-by-building procedures for disposition of the home run wiring, those procedures will govern the disposition of the wiring that is dedicated to each loop other than the cable home wiring within each unit. Consistent with our building-by-building procedures, the MDU owner will be permitted to purchase the

[440]GTE Docket 92-260 Comments at 5-6; *see also* OpTel Docket 92-260 Comments at 2, 4-6 (should consider each MDU building with loop-through wiring as a single premises and permit owner access to all wiring in the building).

[441]Liberty Docket 92-260 Comments at 1-2.

[442]New York City Docket 92-260 Comments at 6. *But see* OpTel Docket 92-260 Comments at 5 (no benefit to setting demarcation point at wall plate because each subscriber cannot separately choose service).

[443]Ameritech Docket 92-260 Comments at 7-8; GTE Docket 92-260 Comments at 6; NYNEX Docket 92-260 Comments at 4; PacTel Docket 92-260 Comments at 2-3; USTA Docket 92-260 Comments at 2; Ameritech Docket 92-260 Reply Comments at 7; PacTel Docket 92-260 Reply Comments at 1-2; SNET Docket 92-260 Reply Comments at 12.

[444]Building Owners, et al., Docket 92-260 Comments at 5 and n.3; CATA Docket 92-260 Comments at 4; NCTA Docket 92-260 Comments at 5; New York City Docket 92-260 Comments at 6-7 (it prohibited loop-through installations in 1990, but argues that local franchising authority is in the best position to evaluate the community's needs and whether loop-through wiring is appropriate there, so Commission should not); Time Warner Docket 92-260 Comments at 7-8; Time Warner Docket 92-260 Reply Comments at 8-10. *But see* Bell Atlantic Docket 92-260 Comments at 1-2 (the Commission should exercise it ancillary Title I jurisdiction to prohibit future loop-through installations); Ameritech Docket 92-260 Reply Comments at 8 (Commission should use its "ancillary jurisdiction" to prohibit future loop-through wiring installations).

[445]GTE Docket 92-260 Comments at 4.

loop-through home wiring pursuant to our cable home wiring rules. In addition, where the MDU owner terminates service for the entire loop but does not or cannot invoke our procedures for the disposition of home run wiring, the MDU owner will nevertheless have certain rights to the home wiring within the individual dwelling units.

160. Where a building is comprised of rental units, the building owner will have the right to elect to switch service providers and the right to purchase the loop-through home wiring. In buildings in which persons have a direct or indirect ownership interest in individual units (as with condominiums and cooperatives), the election of whether to switch service providers will be determined under the rules of the association or entity that owns and controls the building's common areas, in a manner similar to other decisions made by the entity with respect to the common areas. If the MDU owner elects to switch to a new service provider but does not wish to purchase the loop-through home wiring, the new service provider may elect to purchase the wiring.

161. Allowing the MDU owner to purchase loop-through home wiring under these circumstances will allow that party to control the wiring. We agree with the commenters that assert that, at least in competitive markets, the MDU owner has a significant incentive to represent the subscribers' interests.[446] In addition, the management structures of condominium or cooperative buildings are designed to reflect their residents' interests. Allowing the MDU owner to control loop-through home wiring gives the subscriber an opportunity for increased choice and enhanced service, and furthers Section 624(i)'s statutory purpose of facilitating the transfer to an alternate service provider with minimal disruption to the subscriber.[447] We previously excluded loop-through wiring from our cable home wiring rules because we did not believe it was appropriate to give the initial individual subscriber in the loop control over the cable service of all remaining subscribers on the loop.[448] Under the procedures we adopt today, that situation cannot occur.

162. We note that New York City appears to misunderstand our proposal when it complains that our proposal will turn the wiring over to an alternative service provider "replacing one monopoly for another" and requires the cable operator to rewire if it is subsequently asked to provide service.[449] We clarify that, as we have stated, our rules will provide the MDU owner, not the alternative provider, with

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[446]*See, e.g.*, Ameritech Docket 92-260 Comments at 6 and Docket 92-260 Reply Comments at 3, 6-7; NYNEX Docket 92-260 Comments at 3 (competition would be better served with building owner rather than cable operator control); OpTel Docket 92-260 Comments at 2, 6-8 (owner has long term interest in building and the services available in it; residential real estate market is fiercely competitive; building owner can act as subscriber's authorized agent); RCN Docket 92-260 Comments at 4-5 (no need for concern over building owner control).

[447]*See* 1992 House Report; S. Rep. No. 92 102d Cong., 1st Sess., at 23 (1991) ("1992 Senate Report"); *Cable Home Wiring Further Notice*, 11 FCC Rcd at 4565-4566; *Cable Wiring Order*, 8 FCC Rcd at 1435; *Notice of Proposed Rulemaking*, MM Docket No. 92-260, 7 FCC Rcd 7349; *see also* Bell Atlantic Docket 92-260 Comments at 1 (Commission should pursue a single objective: to permit individual tenants or, if that is technologically impossible, the building owner, to obtain cable service from competing service providers in the least disruptive fashion and with the minimum of service delay); *see also* Ameritech Docket 92-260 Reply Comments at 2-3.

[448]*See Cable Wiring Order*, 8 FCC Rcd at 1437.

[449]*See* New York City Docket 92-260 Comments at 4-5; *see also* CATA Docket 92-260 Comments at 2.

the first opportunity to purchase the loop-through wiring.[450] Once the MDU owner owns and controls the wiring, the cable operator will be on equal footing under our rules with other video service providers with regard to subsequently providing service to the tenants.[451] Only if the MDU owner declines to purchase the wiring will the alternative provider have the opportunity to purchase the loop-through wiring.

163. Contrary to the arguments of some cable interests,[452] the Commission has the authority to apply our home wiring and home run wiring rules to loop-through wiring configurations. We have the express authority under Section 624(i) to apply our home wiring rules to the loop-through wiring that is within the individual dwelling units because it is within the subscriber's premises. In addition, we believe, for reasons described above, that Sections 4(i) and 303(r) provide us with the authority to apply our rules regarding the disposition of home run wiring to loop-through wiring in the common areas of MDUs. We disagree with Time Warner's assertion that including loop-through wiring in our rules would constitute a taking under the Fifth Amendment.[453] Including loop-through wiring within our rules as explained herein will not result in cable operators' entire distribution systems "essentially be[ing] confiscated."[454]

164. We will set the demarcation points, i.e., the points between which the MDU owner may purchase the loop-through home wiring under our cable home wiring rules, at or about 12 inches outside the point at which the loop enters or exits the first and last individual dwelling units on the loop, or as close as practicable where 12 inches outside is physically inaccessible. In some cases, the loop may begin and end outside of the same unit, and thus the demarcation points shall be 12 inches outside the point at which the loop enters and exits that one unit, or as close as practicable where 12 inches outside is physically inaccessible. We believe that this is consistent with Section 624(i), i.e., the loop-through home wiring is within the customer's premises, and with the cable demarcation point for non-loop-through configurations. We note that one of our prior concerns was that establishing a separate demarcation point for each subscriber on the loop was not feasible.[455] Under the rules set forth herein, however, one entity will be purchasing the entire home wiring loop, making it unnecessary to set a demarcation point for each subscriber's unit.

165. We will apply the same rules with respect to compensation and technical standards that we apply to non-loop-through wiring systems as well. In other words, the loop-through wiring on the subscriber's side of the demarcation point may be purchased by the MDU owner at the replacement cost as defined in Section 76.802(a).[456] The loop-through wiring outside the demarcation points up to the point

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[450] *See* Bartholdi Docket 92-260 Reply Comments at 2.

[451] *See id.* at 3.

[452] *See, e.g.,* CATA Docket 92-260 Comments at 2-3; Time Warner Docket 92-260 Reply Comments at 3.

[453] *See* Time Warner Docket 92-260 Reply Comments at 6-7.

[454] *See id.* at 6. Also see Section III.A.2.d. above for a discussion of the takings issue with respect to home run wiring.

[455] *See Cable Home Wiring Further Notice*, 11 FCC Rcd at 4580.

[456] 47 C.F.R. § 76.802(a).

at which the loop connects with the riser or feeder cable may be addressed pursuant to the procedures set forth above with regard to the disposition of home run wiring.

166. Despite the competitive drawbacks of loop-through wiring, we do not believe it necessary for the Commission to prohibit future installations of loop-through wiring configurations. We believe that such a prohibition would unduly restrict the configuration options available to building owners and service providers.[457] We have found no evidence in the record that cable operators have installed loop-through wiring in order to evade our rules since they were implemented in 1993.[458] Also, the application of our home wiring rules to loop-through systems where the MDU owner seeks to switch service providers should reduce any incentive cable operators may have to install loop-through configurations for anti-competitive reasons.

F. Video Service Provider Access To Private Property

1. Federal Mandatory Access Requirements

a. Background

167. In the *Inside Wiring Notice*, we sought comment on the ability of various service providers to obtain access to private property.[459] Specifically, we sought comment on the legal and practical impediments faced by telecommunications service providers in gaining access to subscribers, and on the current status of the law regarding access to private property by cable operators and telephone companies.[460] We also sought comment on whether allowing a company that holds an easement for one service to rely on that same easement to provide another service would constitute a "taking" under the Fifth Amendment.[461] The *Inside Wiring Notice* further sought comment on whether the Commission can and should attempt to create access parity among service providers and, if so, what the rules regarding such parity should be, and whether there were any statutory or constitutional impediments to this goal.[462]

168. Telephone companies and alternative video providers generally assert that there is a need for rules that will provide comparable property access rights for the delivery of all services.[463] NYNEX

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[457] *See* Liberty Docket 92-260 Comments at 3 (loop-through wiring is well-suited to bulk service arrangements, which can result in consumer benefits).

[458] *See* GTE Docket 92-260 Comments at 6.

[459] *Inside Wiring Notice*, 11 FCC Rcd at para. 58.

[460] *Id.* at paras. 61 and 62.

[461] *Id.* at para. 63.

[462] *Id.* at para. 64.

[463] *See, e.g.*, GTE Comments at 2, 21 (uniform, non-discriminatory access rules should be adopted for delivery of all voice, data, and video services; creating access parity is vital); MFS Reply Comments at 14 (Commission should follow Guam's lead, by requiring installation of conduit in MDUs which is large enough to accommodate multiple cables and by requiring service providers to leave a pull wire in the conduit for other service providers).

explains that, while state laws give telephone companies the authority to use public rights-of-way, the laws do not always provide access to private property. NYNEX claims that, in states that do provide telephone companies with the power of eminent domain over private property, the use of such eminent domain in MDUs or commercial buildings is "impractical due to statutory time periods, costs, and survey requirements."[464] NYNEX states that its telephone companies have obtained access to MDUs not through easements or eminent domain proceedings, but with the tacit or express consent of the landlords.[465]

169. PacTel argues that the notion of allowing competition would be purely illusory if alternative video service providers did not have access to private easements and rights-of-way.[466] AT&T states that the Commission must assure that competitive service providers have the same access rights to the subscriber's or building owner's property as incumbent service providers currently enjoy.[467] AT&T argues that, pursuant to Sections 251(b)(4) and 251(c)(3) of the 1996 Act, the Commission should require that all new service providers have access to portions of incumbents' network access facilities, including rights-of-way, easements and other pathways to customer wiring.[468] MFS argues that government intervention is appropriate and necessary to proscribe discriminatory actions by owners and managers that stymie competition.[469] NYNEX also supports the adoption of rules that would promote open access for

[464]NYNEX Comments at 12-13.

[465]*Id.*

[466]PacTel Reply Comments at 2. PacTel also argues that the Commission has already taken a strong stand in favor of allowing video service providers access to public and private property (citing our *Report and Order and Further Notice of Proposed Rule Making* in IB Docket No. 95-59 (supporting preemption of local regulation of satellite antennas)); *see also* NTCA Reply Comments at 3 (goal of Commission's rules should be to ensure accessibility for all providers; efficient delivery of service and opportunity for choice can best be accommodated by reasonable, flexible rules that permit subscribers to choose among providers in a competitive environment); DIRECTV Comments at 13-14 (supporting open access and the right of service providers to install or upgrade common wiring in an MDU, unless a property owner can demonstrate a reduction in property value by the exercise of such access rights). *But see* Ameritech Reply Comments at 11 (there is no private property cable access issue to be solved; cable operators' 1994 national penetration rate of 65.2% and installation of facilities which pass 96% of all U.S. television households demonstrates that such access is readily available).

[467]AT&T Reply Comments at 10; *see also* NYNEX Comments at 17. NYNEX also supports rules that would require a LEC to afford access to competing local exchange carriers where the LEC's contractual or easement agreements give the LEC the right to do so. However, NYNEX points out that contractual rights obtained by its telephone companies to provide service to buildings are limited at best. NYNEX Comments at 15.

[468]AT&T Reply Comments at 10-11; *see also* U S West Comments at 7 (facilities use agreements for unbundled LEC network elements are contemplated by the 1996 Act; to the extent existing inside building wire is owned by a LEC and is part of a LEC's network, it is a network element subject to Sections 251(c)(2) and (3); however, deregulated wire is not a potential network element).

[469]MFS Reply Comments at 10-13 (property owners often block building entry and attempt to charge new entrants exorbitant, discriminatory access fees; building owners and managers are often not motivated by tenants demands, but rather by profit/revenue opportunities); *see also* MFS Reply Comments at 6-9 (Commission should adopt a general non-discrimination access rule with three requirements: equal entry charges to all wireline service providers; non-discriminatory interconnection and unbundled access to the incumbent LEC's network to allow connection with the customer's demarcation point; and establishment of dispute resolution responsibility with local

alternative telephone and video service providers on a going forward basis.[470] NYNEX notes, however, that legislation may be the only way to ensure comparable access for competing telephone and video service providers, and further cautions that courts may deem laws or regulations that force landlords to allow providers access to their buildings to be a taking, requiring payment of just compensation.[471]

170. Two wireless competitive LECs, Teligent and WinStar, urge the Commission to adopt a rule ensuring reasonable and nondiscriminatory access to inside wiring. WinStar proposes that the Commission issue a rule requiring owners of multiple tenant units to grant telecommunications service providers physical access to inside wiring on nondiscriminatory terms, so long as the owners are allowed to demand just compensation from the providers after access has occurred.[472] Teligent argues that the Commission should mandate building access through an interpretation of Section 224 that encompasses private rights-of-way to building rooftops,[473] and should ensure that competitive carriers have access to the riser cables of office buildings as part of the incumbent LEC's unbundling requirement.[474]

171. Generally, proponents of a federal mandatory access law argue that such a law would promote competition through ensuring competitors uniform access to MDUs. These commenters claim that property owners often block building entry for service providers, or are willing to grant access only on unreasonable or discriminatory terms.[475] They further claim that building owners and managers are motivated to exploit business opportunities, rather than by a desire to provide tenants with access to diverse and advanced telecommunications services.

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franchising authorities and state commissions).

[470]NYNEX Comments at 17.

[471]*Id.* at 16-17. *But see* AT&T Reply Comments at 10-11 and n. 28 (asserting that Section 251 of the 1996 Act provides the Commission clear statutory authority to require incumbent LECs to offer new carriers the ability to share their facilities on the network side of the demarcation point, which should alleviate building owners' concerns that placing wires and other facilities on their private property is a taking); *cf.* MFS Reply Comments at 6, 18 and 21 (where an owner allows incumbents exclusive access but denies new entrants the same access, the owner effectively creates an exclusive easement, and enforcement of such easements should be preempted under Section 253(d) of the 1996 Act; a rule prohibiting discriminatory access would not constitute a "taking" because it would only require building owners to offer new entrants the same access provided to incumbents under the same terms, and would require compensation at the market rate paid by incumbents).

[472]WinStar Comments at 16-21.

[473]Teligent Comments at 16-21.

[474]*Id.* at 22-24.

[475]*See, e.g.,* MFS Reply Comments at 10-13 (property owners often block building entry and attempt to charge new entrants exorbitant, discriminatory access fees; building owners and managers are often not motivated by tenants demands, but rather by profit/revenue opportunities); Teligent Comments at 9-16 (some building owners use their control over bottleneck facilities to refuse building access entirely, while others seek to extract unreasonable rates and conditions for access); WinStar Comments at 7 (many landlords are exercising their monopoly power when leasing rooftop space, inside wiring and riser access).

172. Two commenters suggest that existing telephone easements should be construed to allow incumbent service providers access to provide additional services. Bell Atlantic seeks "clarification" that a provider that has obtained access to provide any service (e.g., telephone service or cable television service) may use that access to provide additional services.[476] NYNEX contends that, if it delivered video programming using a common carrier service, it would "arguably" have the same access rights as a telephone company providing any other common carrier service.[477]

173. Cable operators also note the disparity in property access rights which exists among service providers. NCTA claims that "[b]y virtue of their status as monopoly providers, telephone companies benefit . . . from access statutes and easements that are not available to cable and other providers."[478] Thus, NCTA argues, the Commission must promote policies that broaden access for all competitors.[479] Charter/Comcast notes that public utilities are often granted private easements because property owners would otherwise be unable to obtain the utilities' monopoly services;[480] however, property owners have fewer incentives to grant easements to franchised cable operators due to existing choices among video providers.[481] Charter/Comcast urges the Commission to rectify this incongruity by construing Section 621(a)(2) of the Communications Act as prohibiting a property owner from denying a franchised cable operator access to an easement on the property when the owner has already granted or is obligated to grant an easement to other utilities, whether public or private.[482] Other cable operators urge the Commission to adopt an access rule that would allow residents to choose among providers instead of having to accept the property owner's choice of provider.[483]

174. Marcus Cable, et al., claim that, under Section 706 of the 1996 Act, the Commission must adopt an access rule. Section 706 directs the Commission to encourage deployment of advanced

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[476]Bell Atlantic Reply Comments at 10.

[477]NYNEX Comments at 14; *see also* Liberty Comments at 22 (statutes that give common carriers MDU access for telephony could be interpreted to guarantee such carriers access for provision of video service).

[478]NCTA Reply Comments at 14.

[479]*Id.*

[480]Charter/Comcast Comments at 6; *see also* NYNEX Comments at 13.

[481]Charter/Comcast Comments at 6.

[482]*Id.* at 10-12. *But see* Building Owners, et al., Comments at 11 (legislative history of Section 621(a)(2) of the 1984 Cable Act demonstrates that Congress did not intend to give the Commission power to mandate access. In 1984, the House deleted from H.R. 4103 the section that would have directed the Commission to promulgate regulations guaranteeing cable access to MDUs, commercial buildings and trailer parks); Building Owners, et al., Reply Comments at 8 (the 1996 Act provides no mandatory access provisions; if Congress had wanted to give cable operators access rights to private property, it could have done so in this most recent comprehensive revision of federal telecommunications law).

[483]*See, e.g.*, Guam Cable Comments at 6 (recommending access rules which mirror Illinois statutes); TKR Cable Reply Comments at 5-6 (noting that the arguments raised against multiple provider access to MDUs are similar to those raised against allowing multiple cable franchises).

telecommunications capability to all Americans by promoting competition and removing barriers to infrastructure investment, and, according to the Marcus Cable, et al., the record in this proceeding demonstrates that MDU property owners stand as a barrier to continued development of broadband services.[484]

175. Several commenters believe that there may be limits to the Commission's authority to enact a federal rule mandating access to MDUs in order to resolve variations in access rights.[485] Time Warner argues that the Commission must ensure that a landlord's ability to restrict access is not enhanced as a result of any rules adopted, but cautions that the adoption of a federal uniform access policy may be premature and the subject is better left to the states.[486] ICTA argues that the Commission does not possess the power of eminent domain and that a mandatory cable access law will lead to a lessening of competition rather than an expansion of competition.[487] ICTA also notes that Congress has repeatedly considered and rejected a federal mandatory cable access law.[488]

176. Building Owners, et al., argue that requiring a landlord to permit a third party to occupy the premises and attach wires to the building is legally indistinguishable from the intrusion which the Supreme Court invalidated in *Loretto v. Teleprompter Manhattan CATV Corp.*[489] Building Owners, et al.,

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[484]Marcus Cable, et al., Reply Comments at 11-12.

[485]*See, e.g.*, CATA Comments at 9-10; CATA Reply Comments at 7 (Commission has no present authority to enact competitive access regulations, but should urge Congress to adopt a uniform access law); Cox Reply Comments at 15, n. 29 (a rule granting access to MDUs
would reflect sound public policy, and the Commission should mandate access to extent it has authority to do so; if the Commission has no such authority, it should request that Congress grant it authority); Further Reply of Community Associations Institute at 3-6.

[486]Time Warner Reply Comments at 48, 58. State regulatory authorities agree that such matters are best left to the states. *See* New Jersey BPU Comments at 15 (access rules should be based on and consistent with models adopted by the states); New York City Comments at 2 (local property use matters are best resolved at the local level, and should continue to be treated in a manner that gives deference to traditional local health, safety and welfare concerns).

[487]ICTA Comments at 38, 50; *see also* OpTel Reply Comments at 2 (a Commission-imposed federal mandatory access requirement would harm consumers and competition); D. Chudnow Comments at 2 (mandating competitive access without compensation would unconstitutionally impair existing contractual rights under state and federal law, since many owners have long-term exclusive contracts with service providers, and such an access requirement would create blanket unrestricted easements over owners' property, which constitute takings under the Fifth Amendment). *But see* TKR Reply Comments at 10 (there is a fundamental difference between whether owners can be forced to provide access and whether they can be forced to do so without compensation; the Commission "surely has the power, short of condemnation, to require, as the New York State Cable Commission did in *Loretto*, mandatory access with compensation").

[488]ICTA Comments at 38-39, 41 and 42; *see also* Building Owners, et al., Comments at 11.

[489]Building Owners, et al., Comments at 6-7, (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)); *see also* ICTA Comments at 36 (citing *Loretto*, 458 U.S. at 426 and *Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992)); Further Reply of Community Associations Institute at 4.

claim the real estate market is thriving, competitive, and responsive to the needs of tenants, and that government regulation would interfere with the "on-the-spot management" needed to effectively address safety and security concerns, assure compliance with building codes, coordinate the needs of different tenants and service providers, and generally oversee efficient day-to-day operations.[490] TKR, however, asserts that if the market were already providing tenants with the services they need, alternative providers would not be complaining about their inability to gain access. According to TKR, the Commission should remove MDU owner gatekeeper control by requiring that each subscriber be entitled to the services of his/her choice.[491]

177. Building Owners, et al., also point to property owners' responsibility for tenant security as a concern.[492] But others state that concerns regarding safety, security and aesthetics can be easily addressed.[493]

b. Discussion

178. While we agree that nondiscriminatory access for video and telephony service providers enhances competition, we will not adopt a federal mandatory access requirement at this time. We note that telecommunications carriers' access to telephone companies' facilities and rights-of-way under the 1996 Act are currently under reconsideration in *First Report and Order* in CC Docket No. 96-98 and CC Docket No. 95-185 ("*Interconnection Order*").[494] We do not believe that the record in this proceeding

[490]Building Owners, et al., Comments at 18; *see also* ICTA Comments at 43 (owners would be foolish not to ensure that the particular broadband services available were of the highest quality at a competitive price); Building Owners, et al., Comments at 32, 34 (only the landlord can coordinate the conflicting needs of multiple tenants and multiple service providers, and therefore the best approach is to allow owners to retain maximum flexibility over the control of inside wiring of all kinds); Building Owners, et al., Reply Comments at 3, 5 (discrimination "either does not exist or is simply a rational response to market conditions").

[491]TKR Reply Comments at 11.

[492]Building Owners, et al., Comments at 31 (owners may be found legally liable for failing to protect tenants; telecommunications service providers have no such obligations, and may violate security policies or even commit illegal or dangerous acts themselves).

[493]Marcus, et al., Reply Comments at 7 (video service providers' personnel could be required to check in with landlords before doing work; wiring safety concerns are governed by industry standards; providers could be required to compensate landlords for damage caused in installation and removal of wiring); DIRECTV Reply Comments at 4-5 (owners should be able to schedule building access, as with all other service providers, while ensuring that building codes are not violated, and all installers should be held to same set of standards and not allowed to perform work unless they can do so safely; tenants should be able to decide for themselves which services have merit based on their own individual needs).

[494]*First Report and Order*, CC Docket No. 96-98 (Implementation of Local Competition Provisions in the Telecommunications Act of 1996) and CC Docket No. 95-185 (Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers), 11 FCC Rcd 15499 (1996).

provides a sufficient basis for us to address these issues. We will defer decisions on these issues to that proceeding.[495]

179. In addition, as stated above, Charter/Comcast urges the Commission to construe Section 621(a)(2) to prohibit a property owner from denying a franchised cable operator access to an easement on the property when the owner has already granted or is obligated to grant an easement to other utilities, whether public or private.[496] Section 621(a)(2) provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . . "[497] Numerous court decisions have interpreted the statutory language and legislative history of Section 621(a)(2), several finding that this section does not provide cable operators access to purely private easements granted to utilities.[498] We decline to address those rulings here, but will continue to examine these issues as we seek to ensure parity of access among all telecommunications and video services providers. Similarly, we decline at this time to adopt a mandatory access rule under Section 706 of the 1996 Act,[499] but may revisit this issue as we consider issues of service provider access in the broader competitive context.

180. We believe that whether an incumbent provider may use its existing easements or rights-of-way to provide new or additional services[500] generally depends on state law interpretations of the terms of the easements or rights-of-way. While we decline at this time to decide as a general matter whether

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[495]Similarly, as noted above, we do not decide herein whether under Section 207 of the 1996 Act viewers living in rental properties, and those who need access to common property, have the right to receive certain video programming services over the property owner's objections. This issue will be addressed in IB Docket No. 95-59 (Preemption of Local Zoning Regulation of Satellite Earth Stations) and CS Docket No. 96-83 (Implementation of Section 207 of the Telecommunications Act, Restrictions on Over-the-Air Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service).

[496]Charter/Comcast Comments at 10-11. *But see* Building Owners, et al., Comments at 11 (legislative history of Section 621(a)(2) of the 1984 Cable Act demonstrates that Congress did not intend to give the Commission power to mandate access. In 1984, the House deleted from H.R. 4103 the section that would have directed the Commission to promulgate regulations guaranteeing cable access to MDUs, commercial buildings and trailer parks); Building Owners, et al., Reply Comments at 8 (the 1996 Act provides no mandatory access provisions; if Congress had wanted to give cable operators access rights to private property, it could have done so in this most recent comprehensive revision of federal telecommunications law).

[497]47 U.S.C. § 541(a)(2).

[498]*See, e.g., Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992); *TCI, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable, Inc. v. Sequoyah Holding Condo. Council*, 991 F.2d 1169 (4th Cir. 1993); *Cable Investors, Inc. v. Woolley*, 867 F. 2d 151 (3d Cir. 1989); *Cable Assocs. v. Town & Country Mgmt. Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989). *But see, e.g., Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, 835 F. 2d 1359 (11th Cir. 1988).

[499]*See* Marcus Cable, et al., Reply Comments at 11-12.

[500]*See, e.g.*, Bell Atlantic Reply Comments at 10; NYNEX Comments at 14; Charter/Comcast Comments at 10-11; NCTA Reply Comments at 14.

such easements and rights-of-way permit the provision of additional services, we believe that we do have the authority in certain instances to review restrictions imposed upon such use.[501]

2. State Cable Mandatory Access Requirements

a. Background

181. In the *Inside Wiring Notice*, we sought comment on the types of access provided by state mandatory access statutes and who qualifies for such access.[502] We sought comment on what type of access is provided to cable operators under statutes granting mandatory access and what type(s) of access to private property states grant to telephone companies.[503]

182. According to the record in this proceeding, some form of mandatory access law may exist in approximately 18 U.S. jurisdictions, including Connecticut, Delaware, the District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, West Virginia and Wisconsin.[504] The record also indicates that there may be local ordinances that provide similar access rights.[505] Commenters claim that these statutes were generally enacted due to local franchising authorities' efforts to ensure that MDUs would have cable programming service and to prevent owners from denying access based on aesthetic or other considerations.[506] Commenters further contend that state mandatory access statutes were intended to serve as consumer protection laws at a time before franchised cable operators faced competition from alternative video service providers.[507]

183. According to NYNEX, while state laws give telephone companies the authority to use public rights-of-way, they do not always provide access to private property. In states that do provide the telephone company with the power of eminent domain over private property, NYNEX claims that the use of such eminent domain in MDUs or commercial buildings is not practical due to statutory time periods, costs, and survey requirements. NYNEX asserts that its telephone companies generally obtain access to

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[501] *See, e.g.*, 47 U.S.C. § 253; *In the Matter of TCI Cablevision of Oakland County, Inc.*, CSR Docket No. 4790, FCC 97-331 (released Sept. 19, 1997).

[502] *Inside Wiring Notice*, 11 FCC Rcd at para. 62.

[503] *Id.*

[504] ICTA Comments at 48, n.24; WCA Comments at 6-7 and n.15; Ex Parte Letter from Daniel L. Brenner, counsel for NCTA, to William F. Caton, Acting Secretary, Federal Communications Commission (February 18, 1997).

[505] ICTA Comments at 48.

[506] WCA Comments at 7; MDC Comments at 4; Continental Reply Comments at 11.

[507] *Id.*

MDUs not through easements or eminent domain proceedings but by tacit or express agreements with the property owner.[508]

184. Alternative video service providers raise concerns over the disparity in access rights to private property that exists between new entrants and franchised cable operators or incumbent LECs. Specifically, these commenters contend that the most serious barrier to competition in the multichannel video programming service market is the unfair advantage that franchised cable operators have as a result of state mandatory cable access laws.[509] They argue that state mandatory access laws guarantee access only to franchised cable operators and therefore unfairly advantage the franchised cable operator.[510] They also allege that mandatory access laws reduce competition in the MVPD market, and, if such laws are not eliminated, a competitive marketplace for multichannel video programming services will be virtually impossible to promote.[511] OpTel argues that because current state access laws overwhelmingly favor franchised cable operators, they slow the growth of competition.[512] OpTel explains that, where franchised cable operators have a legal right of access under state law, property owners are reluctant to provide alternative providers with access, because the owner knows that the franchised cable operator will likely demand access and overbuild the property, causing great disruption.[513]

185. Several commenters request that the Commission preempt state mandatory access laws.[514] Commenters assert that such preemption would be consistent with prior Commission actions, including the Commission's preemtion of laws that effectively hinder the use of satellite television receive-only

[508]NYNEX Comments at 12-13.

[509]*See, e.g.*, ICTA Comments at 42, 48, 59 (where there is no mandatory access, all providers must compete at the property line for the right to serve by obtaining the property owner's permission for access); Wireless Holdings Reply Comments at 1, 2 (mandatory access laws limit the ability of owners to enter into exclusive arrangements, and it is cost-prohibitive for new entrants to install facilities in MDUs without exclusivity).

[510]*See, e.g.*, Liberty Cable Comments at 13-14; MDC Comments at 3; WCA Comments at 7-8; Wireless Holdings Reply Comments at 2.

[511]*See, e.g.*, MDC Comments at 7; OpTel Reply Comments at 2; WCA Comments at 6.

[512]OpTel Reply Comments at 2.

[513]*Id.*

[514]*See, e.g.*, Liberty Comments at 13, 22 (preemption should extend to any statute that guarantees access to MDUs by franchised MVPDs, regardless of whether their service is offered alone or with telephony, and regardless of the number of wires used, including statutes that grant common carriers MDU access for telephony purposes to the extent that they are interpreted to guarantee such carriers access for the provision of video services); Multimedia Development Comments at 7; OpTel Reply Comments at 2; WCA Comments at 6 ("it will be virtually impossible for the Commission to promote a competitive marketplace for multichannel video services unless the Commission preempts all State mandatory access laws which discriminate in favor of franchised cable operators").

antennas ("TVROs") and state regulation of SMATV systems.[515] ICTA advocates federal preemption of state mandatory access laws, arguing that the Commission has independent preemption authority to act, even in the absence of congressional direction, as long as its action is neither arbitrary nor exceeds its statutory authority.[516] Such preemption would not be arbitrary if it represents a reasonable accommodation of conflicting policies that are within the Commission's statutory authority.[517] According to ICTA, state mandatory access laws unfairly advantage the franchised cable operator, discourage competition, provide no benefit to the public, and conflict with the Commission's mandate to promote the growth of competition in the cable industry. ICTA asserts that preemption of such state laws would therefore be a reasonable accommodation of conflicting policies.[518]

186. Telephone providers also urge the Commission to preempt state mandatory access laws that confer exclusive or preferential rights on incumbent service providers.[519] These commenters argue that the Commission has the authority under Section 253 of the 1996 Act to preempt state or local legal requirements that have the effect of prohibiting carriers from providing telecommunications services, and that the Commission should therefore exercise its preemption authority under Section 253(b) to nullify the offending portions of the state mandatory access laws.[520] AT&T argues that existing state laws granting access are not uniform and are often unclear, and that, to the extent competitive service providers are

[515] *See, e.g.*, Liberty Comments at 19-20 and n. 28, (citing 47 C.F.R. § 25.104 as preempting local zoning regulations that discriminate between satellite receive-only antennas and other types of receiving antennas; and *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (2d Cir. 1984) ("*ESCOM*") as preempting state regulation of SMATV systems that results in the suppression of that service in order to advance interests of franchised cable operators); WCA Comments at 8-9, and n.19 (citing *In re Orth-O-Vision, Inc.*, 82 F.C.C.2d 178 (1980), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982) ("*Orth-O-Vision*"), as upholding the Commission's preemption of a New York state law imposing franchise requirements on a MATV system was upheld where such regulation would have "[inhibited] the growth of MDS in the provision of freely competitive interstate services.").

[516] ICTA Comments at 53-55 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984)); *see also* Multimedia Development Comments at 5 and n. 4 (citing *Louisiana PSC v. FCC*, 476 U.S. 355 (1986); *National Assn. of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (DC Cir. 1989); and *Orth-O-Vision* (providing that the Commission has authority to preempt state and local regulations which are inconsistent with and frustrate the execution of federal policy over interstate communications matter)). Furthermore, the Commission has Congressional authority to promote the nationwide development of wireless cable, and may preempt any state law that impedes the Commission's own regulatory scheme.

[517] ICTA Comments at 53-55 (citing *Crisp*, 467 U.S. 700).

[518] *Id.* at 55.

[519] *See, e.g.*, AT&T Reply Comments at 8-9; MCI Reply Comments at 3; MFS Reply Comments at 2-6; NYNEX Comments at 17; RCN Reply Comments at 9.

[520] AT&T Comments at 9, n. 26.

prevented by state or local law from having the same access as incumbents, the Commission can preempt that state or local law.[521]

187. Most cable operators oppose the preemption of state cable mandatory access laws.[522] According to these parties, there is no basis in policy or law for the Commission to preempt statutes that guarantee subscribers access to franchised cable service. Marcus Cable, et al., argue that the Commission's prior preemption actions were undertaken to preempt laws that prohibited competitive services, not laws that guarantee subscribers a choice of video service providers.[523] Continental notes that state access laws are a response to landlords' access bottleneck, and that the preemption of existing access laws would only strengthen landlords' power to make both service and provider choices for tenants, by resurrecting the landlords' power to contract exclusively with service providers.[524] NCTA maintains that mandatory access laws are not discriminatory. Such laws do not exclude others from providing service, but merely ensure that consumers have access to multichannel video programming services.[525] NCTA further argues that there is no need for preemption of such laws because alternative providers may avail themselves of access statutes by becoming franchised, now that exclusive franchises are prohibited.[526] Time Warner claims that franchise service obligations, such as universal service requirements, sufficiently distinguish franchised operators so as to merit special treatment under state access laws.[527]

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[521]AT&T Reply Comments at 9, and n. 26. AT&T further contends that all service providers should be assessed building entry fees equally. *Id.*

[522]*See, e.g.*, Continental Reply Comments at 11; Marcus Cable, et al., Reply Comments at 11; NCTA Reply Comments at 13-14; Time Warner Reply Comments at 54.

[523]Marcus Cable, et al., Comments at 10-11 (in *Orth-O-Vision*, the Commission preempted a state law that prohibited competitive service by MMDS providers to MDUs. Similarly, if preemption is considered at all, only those regulations that might prohibit access to premises should be preempted, not state laws that provide access to subscribers).

[524]Continental Reply Comments at 11; *see also* Marcus Cable, et al., Reply Comments at 11 (preemption of state access laws would deprive MDU residents of a choice of providers and of the opportunity to receive all broadband services that cable operators are beginning to offer and would force MDU residents to accept whatever service building owners and landlords choose to provide).

[525]NCTA Reply Comments at 13-14. *But see* ICTA Comments at 51 (state mandatory access laws were not drafted to ensure MDU residents the right to receive cable service; they do not grant tenants the right to force a cable franchisee to condemn property to ensure tenants' receipt of cable service. A tenant request is typically a prerequisite to forced entry, but the cable franchisee is not obligated to honor the request, even if the tenant has no cable service available whatsoever).

[526]NCTA Reply Comments at 14; Time Warner Reply Comments at 54, 58 (non-franchised providers want the benefits of a franchise without the concurrent obligations; they argue for preemption simply because they seek access to the most lucrative buildings with minimal capital investment).

[527]Time Warner Reply Comments at 55.

b. Discussion

188. Many commenters argue that parity of access rights is necessary to foster a fully competitive market for multichannel video programming and telecommunications services. To achieve such parity, several alternative service providers urge the preemption of state mandatory access laws.[528] Franchised cable operator interests, however, oppose federal preemption of state mandatory access laws[529] and claim that parity of access should be achieved by granting franchised cable operators the same access to easements and rights-of-way as provided to telephone companies and other utilities.[530] They also contend that there are valid distinctions between franchised and non-franchised video service providers, which justify disparate treatment under state access laws.[531]

189. We believe that the record in this proceeding does not support the preemption of state mandatory access laws at this time. While commenters opposing state mandatory access laws argue that these laws act as a barrier to entry, the record also indicates that property owners deny access for reasons unrelated to the state laws, including property damage, aesthetic considerations and space limitations. We believe that our rules regarding the building-by-building and unit-by-unit disposition of home run wiring adopted herein will lower many of these barriers to entry and may alleviate some of the advantages incumbent providers may have with respect to providing service to particular buildings.

190. We remain concerned, however, about disparate regulation of MVPDs that unfairly skews competition in the multichannel video programming marketplace. Despite our decision not to preempt state and local mandatory access laws at this time, we encourage these jurisdictions to evaluate present laws and circumstances to determine whether a nondiscriminatory and competitively neutral environment exists. We believe that establishing competitive parity under these statutes will promote competition among MVPDs and will expand consumer choice.

3. Exclusive Service Contracts

a. Background

191. In discussing provider access to MDUs, many commenters raise the issue of exclusive service contracts between MDU owners and video service providers. Telephony providers generally argue for rules banning cable operators from entering into exclusive contracts for the provision of video service to MDUs and prohibiting cable operators from enforcing the exclusivity provisions of any existing

[528]AT&T Reply Comments at 8-9; ICTA Comments at 53, 55; Liberty Cable Comments at 13; MCI Reply Comments at 3; Multimedia Development Comments at 7; MFS Comments at 4; MFS Reply Comments at 5-6; NYNEX Comments at 17; RCN Reply Comments at 9; WCA Comments at 8.

[529]Continental Reply Comments at 11; Marcus Cable, et al., Reply Comments at 10; NCTA Reply Comments at 13-14; Time Warner Reply Comments at 54.

[530]*See, e.g.*, Charter/Comcast Comments at 11; TKR Cable Comments at 12.

[531]Time Warner Reply Comments at 55-58. Time Warner contends, for example, that Section 621(a)(3) of the Communications Act requires franchised service providers to provide universal service upon request, while non-franchised video providers have no such obligations. *Id.* at 56.

contract.[532] Bell Atlantic argues that prohibiting exclusive contracts would be consistent with the Commission's restrictions on exclusive contracts in other contexts where necessary to increase competition and enhance consumer choice,[533] and that the Commission has directly prohibited exclusive contracts between regulated providers and unregulated parties in the past.[534] AT&T argues that long-term, exclusive service contracts with MDUs are an impermissible barrier to entry and should be preempted under Section 253(d) of the 1996 Act. AT&T further argues that state and local laws which allow for discriminatory application of charges imposed on franchised service providers should also be preempted.[535]

192. Some cable operators also support a ban on exclusive contracts. Cox argues that the Commission should preempt state laws that permit exclusive contracts if they interfere with federal policies, claiming that the policy which led Congress to prohibit exclusive franchises supports a limitation on exclusive contracts for provision of service in MDUs.[536] Continental contends that competition will be impossible where control over access to potential customers is wielded by landlords that decide to contract exclusively with a particular provider, and argues that proposals that empower landlords to make such choices must be rejected in favor of proposals that empower tenants to make those choices themselves.[537]

193. Some alternative video providers, private cable interests and property owners argue that exclusive contracts are imperative for viable competition and oppose the prohibition of exclusive contracts,

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[532]*See, e.g.*, Bell Atlantic Comments at 5; MCI Reply Comments at 3; NYNEX Comments at 17; Ameritech *ex parte* submission, dated May 15, 1997; GTE Comments at 22 (existing cable operators should be barred from entering into or enforcing any exclusive arrangements in excess of 12 months in markets where alternative providers have announced an intention to enter).

[533]Bell Atlantic Reply Comments at 7 (citing *Report and Order* in MM Docket Nos. 92-259, 90-4 and 92-295 (Implementation of the Cable Television Consumer Protection Act of 1992: Broadcast Signal Carriage Issues), 8 FCC Rcd 2965 (1993), and *First Report and Order* in MM Docket No. 92-265 (Implementation of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage), 8 FCC Rcd 3359 (1993)).

[534]*Id.* at 8 (citing 47 C.F.R. §§ 73.635 and 73.239). Bell Atlantic also contends that, in contrast to mandatory access requirements, a prohibition on exclusive contracts would eliminate unreasonable barriers to competition without unduly interfering with the interests of MDU owners and managers, who would still retain discretion to grant or deny access to service providers. *Id.* at 5-6.

[535]AT&T Reply Comment at 9-10, n. 27. *But see* SBC Reply Comments at 6-7 (Commission should not dictate rules regarding exclusive contracts; question of exclusivity in this context is a matter of private contract, and parties should be allowed the freedom to exercise their own choice).

[536]Cox Comments at 27-28 (citing 47 U.S.C. § 152(a) and *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). Cox claims that in some respects, owners resemble local franchising authorities who typically refused to grant more than one cable franchise prior to the Cable Acts of 1984 and 1992; those authorities justified exclusive franchises by asserting an interest in preventing undue disruption to streets, and extracted concessions and payments in return for franchise, just as property owners do in this context. *Id.* at 27 and n. 40.

[537]Continental Comments at 21-22; *see also* Continental Reply Comments at 10 (the Commission's preeminent policy goal should be to promote facilities-based competition, not minimize inconvenience to owners or maximize landlords' ability to enter lucrative exclusive contracts).

claiming that: (1) such contracts are private agreements beyond the scope of the Commission's preemption authority under Section 253;[538] (2) it would be cost-prohibitive for new entrants to install facilities in MDUs without service exclusivity;[539] (3) exclusivity is often necessary to attract investment, given the smaller subscriber base and the provider's need to guarantee a return on its investment;[540]and (4) prohibiting exclusive contracts will never promote unlimited competition in MDUs, since such competition is physically impossible.[541]

194. GTE contends that the Commission does not have jurisdiction to prohibit these exclusive contracts or to limit their duration, because the Commission has no authority over MDU owners and the rates of cable operators facing "effective competition" under Section 623 of the 1992 Cable Act.[542] GTE argues that any use of Section 628(b) of the Communications Act is improper as it does not expand the Commission's jurisdiction to reach these exclusive contracts, since such action would go beyond the Congressional purpose of ensuring video service providers' access to video programming.[543] Such regulation, GTE argues, would contravene the 1996 Act's purpose to promote competition.[544] Similarly, Section 4(i), authorizing the Commission to perform all acts necessary in the execution of its functions, provides no jurisdiction to regulate these contracts since such regulation is directly inconsistent with the Commission's authority.[545]

195. While alternative video providers and private cable interests generally argue that exclusive contracts are imperative for viable competition to exist, they argue that "perpetual" exclusive contracts are anti-competitive. These commenters define "perpetual" exclusive contracts as exclusive service contracts

[538]Building Owners, et al., Reply Comments at 7; *see also* Further Comments of Building Owners, et al., at 6-7; Further Comments of Community Associations Institute at 17 (urging the Commission not to interfere with an MDU owner's ability to consider exclusive contracts because such options are a right of property ownership).

[539]OpTel Comments at 7-8; OpTel Reply Comments at 2; OpTel/MTS *ex parte* submission, dated July 23, 1996, at 2; Wireless Holdings Reply Comments at 2; GTE ex parte submission, dated May 15, 1997, at 1-2; ICTA ex parte submission, dated February 24, 1997, at 3-4; ICTA ex parte submission, dated February 27, 1997.

[540]ICTA Comments at 45. *But see* Cox Reply Comments at 14-15 (arguments that limited duration exclusive contracts are necessary is unpersuasive; exclusivity not necessary to attract and justify investment, and it is folly to suggest that viable facilities-based competition cannot exist in MDUs. Exclusivity allows building owners to choose a monopoly provider rather than allowing subscribers to choose among providers; incentives to enter exclusive contracts serve only the interests of owners and do not promote competition).

[541]WCA Reply Comments at 22-23.

[542]GTE ex parte submission, dated March 31, 1997, at 1-10.

[543]*Id.* at 11-13.

[544]*Id.* at 13-14.

[545]*Id.* at 19-21.

which extend for the life of the provider's franchise and any extensions or renewals thereof.[546] ICTA argues that such contracts are perpetual because it is exceedingly rare that a franchise is not renewed, and that the practical result is that an owner's choice of provider is restricted forever. ICTA further contends that these contracts cannot be justified as a business necessity because they extend well beyond the period necessary for a cable operator to recoup its investment.[547]

196. OpTel recommends a rule requiring future contracts to include a specific term of years, and requiring existing perpetual contracts to expire at the end of the service provider's current franchise term.[548] Similarly, ICTA proposes that all future service agreements between franchised operators and property owners include a durational provision, and that existing perpetual agreements should be void 15 years after the effective date of the contract or upon expiration of the initial franchise term, whichever is sooner. For contracts that would be already void under this standard, ICTA proposes that the Commission allow a six-month period in which franchised operators may phase out service or negotiate new contracts for a term of years if the owner so desires.[549]

197. NCTA proposes a rule to be applied solely in mandatory access states, providing that exclusive contracts ordinarily shall not extend past the end of a current franchise term (or, in the case of a noncable video service provider, until the end of the cable franchisee's term) or a date certain in the contract. NCTA emphasizes, however, that the Commission must enforce this rule in a manner that protects operators' "legitimate business expectations" and operators near the end of their franchise terms.[550] ICTA, WCA, OpTel and MTS argue that there is no reason for the rule to be limited to states where franchised cable operators have mandatory access to all MDUs.[551] Moreover, ICTA opposes linking the duration of exclusive contracts to the current franchise term.[552] ICTA further argues that the proviso for protection of operators' business interests and operators near the end of their franchise term would spawn never-ending litigation and deprive the market of any certainty regarding the termination of these contracts, thus further hobbling competition.[553]

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[546]ICTA Comments at 55; OpTel Comments at 8; WCA ex parte submission, dated October 2, 1996, at 2-3; ICTA/OpTel/MTS/WCA ex parte submission, dated March 27, 1997, at 1; GTE ex parte submission, dated March 31, 1997, at 15; PacTel/PacBell ex parte submission, dated February 10, 1997, at 9; *see also* Further Comments of Skyzone at 2.

[547]ICTA Comments at 56.

[548]OpTel Comments at 8.

[549]ICTA Comments at 57.

[550]NCTA ex parte submission, dated February 13, 1997, at 1.

[551]ICTA/OpTel/MTS/WCA ex parte submission, dated March 27, 1997, at 1; ICTA ex parte submission, dated February 24, 1997, at 3.

[552]ICTA ex parte submission, dated February 24, 1997, at 4.

[553]*Id.*

198. SBC and PacTel advocate a rule that exclusive contracts be allowed only where a service provider has newly installed at least 75% of the inside wiring in an MDU and that the contract term be limited to seven years from the time of new installation.[554] GTE argues that any rule limiting exclusive contracts to new installations must consider the service providers' total investment and not just inside wiring.[555] Furthermore, GTE, ICTA, and WCA oppose any absolute limitation on the duration of exclusive contracts.[556] GTE argues that limitation of the period that a SMATV operator has to recover on its investment would force the operator to raise its price to subscribers, thereby making it less able to compete with an entrenched cable operator.[557] Finally, GTE contends that the Commission has no authority to prohibit exclusive contracts or to limit their duration.[558]

199. In addition to a brief reference in PacTel's Reply Comments,[559] several commenters also have submitted *ex parte* presentations suggesting that a "fresh look" policy be applied to certain exclusive contracts executed prior to the effective date of our rules.[560] For example, OpTel/MTS has suggested applying a "fresh look" to "perpetual" exclusive contracts between property owners and cable operators.[561] Under the OpTel/MTS proposal, property owners that have committed to long-term perpetual exclusive contracts would have a window of 180 days to take a "fresh look" at the marketplace to renegotiate or terminate those contracts without liability in order to avail themselves of a competitive alternative service provider. The "fresh look" period would be initiated at any given MDU upon the request of a private cable operator able to serve the MDU or where the Commission has determined that the cable operator is subject to effective competition. If a property owner wished to enter into another perpetual contract

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[554]SBC/PacTel/PacBell ex parte submission, dated April 28, 1997, at 1. PacTel/PacBell originally supported a 3-5 year limitation on the exclusive contract term but later advocated a 7 year limitation in their joint proposal with the SBC. PacTel/PacBell ex parte submission, dated February 10, 1997, at 9. PacTel/PacBell define "inside wire" to include feeder cable and other components on the network or provider side of the demarcation point and the homerun or drop wiring to individual units. *Id.*

[555]GTE ex parte submission, dated May 15, 1997, at 2 (SMATV operators often also have to invest in an on-premise headend and campus wiring and electronics to transport signals to the various buildings in an MDU complex).

[556]*Id.*; ICTA ex parte submission, dated February 24, 1997, at 4-5; WCA Comments at 13-15; WCA Reply Comments at 22; *see also* OpTel Comments at 9 (no further regulation of exclusive contracts is necessary after "fresh look" doctrine has been adopted).

[557]GTE ex parte submission, dated May 15, 1997, at 2.

[558]*Id.*

[559]PacTel Reply Comments at 6 (at the time new rules are promulgated, Commission should allow property owners benefit of a "fresh look" at existing contracts; otherwise, incumbents will evade new rules by locking MDU owners into long term contracts before rules are promulgated).

[560]*See, e.g.*, OpTel/MTS ex parte submission, dated July 23, 1996; WCA ex parte submission, dated October 2, 1996; SBC Communications, Inc. ex parte submission, dated October 18, 1996, at 5; GTE ex parte submission, dated November 5, 1996, at 8-9; ICTA ex parte submission, dated February 24, 1997, at 4-5; WCA/ICTA/OpTel/MTS ex parte submission, dated March 27, 1997, at 1; *see also* Further Reply of CEMA at 10-13.

[561]OpTel/MTS ex parte submission, at 5.

after being given the opportunity for a "fresh look," it would not be prohibited. The Commission would not dictate an acceptable term length for exclusive contracts.[562] OpTel/MTS argues that the Commission's responsibility to regulate cable rates under Title VI is comparable to its regulation responsibilities under Title II, and that therefore analogies to "fresh look" proceedings under Title II are appropriate.[563] OpTel/MTS further claims a "fresh look" application will also fulfill our obligations to small businesses under Section 257 of the 1996 Act.[564]

200. Similarly, WCA supports the application of a "fresh look" policy to exclusive contracts entered into prior to the emergence of competition.[565] While generally supporting the OpTel/MTS proposal, WCA proposes that the "fresh look" period only apply upon a finding by the Commission that the cable operator is subject to effective competition. The "fresh look" period would be available to a franchised cable operator and an MDU owner that had entered into an exclusive arrangement that extended either for the life of the operator's franchise and any renewals thereof, or for three years or longer.[566] WCA contends that the "fresh look" period should remain open until 180 days after a determination of effective competition to assure MDU owners a reasonable opportunity to consider competitive alternatives and pinpoint precisely when the "fresh look" window expires.[567] SBC agrees with this calculation of the "fresh look" period.[568]

201. GTE likewise supports a "fresh look" policy toward existing exclusive contracts which, GTE argues, were imposed by cable operators not subject to "effective competition." GTE argues that the Commission has jurisdiction to adopt this policy under Section 623 of the Comunications Act, which authorizes the Commission to choose the best method to ensure "reasonable rates" for cable service, and requires that any such regulations "achieve the goal of protecting subscribers" where "effective competition" is not present.[569]

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[562] *Id.* at 6.

[563] *Id.*

[564] *Id.* at 7.

[565] WCA ex parte submission, dated October 2, 1996, at 1.

[566] *Id.* at 3. WCA argues that applying "fresh look" to contracts lasting three years or more comports with our decision in *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369, 7463-64 (1992), *aff'd* 8 FCC Rcd. 7341, 7345 (1993) (existence of certain contracts with access arrangement of three or more years raised potential anti-competitive concerns). *Id.*

[567] *Id.* at 4. Where a cable operator has been held to face effective competition prior to adoption of the "fresh look" policy, the 180 day window should be calculated from the date the Commission adopts the fresh look policy. *Id.*

[568] SBC ex parte submission, dated October 18, 1996.

[569] GTE ex parte submission, dated March 31, 1997, at 14-15; GTE ex parte submission, dated November 15, 1996, at 8-9.

202. NCTA and Jones, however, argue that the "fresh look" policy is inappropriate and the Commission has no authority to adopt it in this situation. The "fresh look" policy applies only where an area previously subject to monopoly opens to competition or where an area is subject to significant changed circumstances. NCTA and Jones argue that these conditions do not exist in the video services market because SMATV systems have competed vigorously with cable services since the 1980s.[570]

b. Discussion

203. We recognize the significant competitive issues raised by commenters regarding exclusive contracts. We are concerned that long-term exclusive contracts may raise anti-competitive concerns because they "lock up" properties, preventing consumers from receiving the benefits of a newly competitive market.[571] However, we also note that alternative providers cite the competitive benefits of exclusive contracts as a means of financing "specialized investments." Without exclusive contracts to allow recovery over time on the cost of new installation, these parties assert that they will be unable to compete with the incumbent cable operator.[572] We believe that the record would benefit from further comment on these issues. In the *Second Further Notice* below, we seek comment on various options, including: (1) adopting a maximum "cap" on the enforceability of all MVPDs' exclusive contracts; (2) limiting the ability of MVPDs with market power from entering into exclusive contracts; and (3) adopting a "fresh look" period for so-called "perpetual" exclusive contracts.

G. Customer Access to Cable Home Wiring Before Termination of Service

1. Background

204. In the *Inside Wiring Notice*, we noted that Section 624(i) required us to prescribe rules concerning the disposition, upon termination of service by a subscriber, of cable home wiring installed by a cable operator.[573] We also noted that our current rules do not require cable operators to allow subscribers to install their own wiring or to rearrange operator-owned wiring.[574] In contrast, telephone inside wiring has been deregulated for nearly ten years, and we tentatively concluded that there was no reason to change the telephone inside wiring rules.[575] We asked for comment as to whether consumers should have the right to install and own their broadband inside wiring and to access wiring on their

[570]NCTA Reply Comments at 20-21; Jones ex parte submission, dated January 8, 1997, at 1, 4 (broad Title II powers that supported "fresh look" policy in the context of common carriers are inapplicable to video service providers).

[571]*See, e.g.,* Bell Atlantic Reply Comments at 4.

[572]OpTel Comments at 7-8; OpTel Reply Comments at 2; OpTel/MTS ex parte submission, dated July 23, 1996, at 2; WHI Reply Comments at 2; GTE ex parte submission, dated March 31, 1997; GTE ex parte submission, dated May 15, 1997, at 1-2; ICTA Comments at 45; ICTA ex parte submission, dated February 24, 1997, at 3-4; ICTA ex parte submission, dated February 27, 1997.

[573]*Inside Wiring Notice*, 11 FCC Rcd at 2765.

[574]*Id.*

[575]*Id.* at 2766.

premises prior to termination of service where such wiring was installed and is owned by the broadband video service provider.[576]

205. We also sought comment on how to protect against signal leakage and maintain signal quality if subscribers were given pre-termination access to their cable inside wiring, and whether the Commission has the authority to promulgate a requirement of pre-termination access.[577] We asked whether the Commission can and should create a presumption that the subscriber owns his or her cable inside wiring and, if so, what kind of showing would be necessary to overcome that presumption. We also sought comment on any statutory or constitutional impediments to creating such a presumption.[578] Finally, we sought comment on whether and how the rules governing access should be harmonized in a world where the cable operator, the telephone company and others may be offering a variety of services over a single wire.[579]

206. Telephone companies, alternative video service providers and others support an extension of the telephone rules to the cable context,[580] arguing that such deregulation would promote competition and customer choice,[581] and that efficient competition requires that all customers have access to and control of all inside wiring within their premises.[582]

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[576] *Id.* at 2767-68.

[577] *Id.* at 2768.

[578] *Id.* at 2769-70.

[579] *Id.* at 2776.

[580] Ameritech Reply Comments at 10 (supporting extension of pro-competitive telephone inside wire rules to cable home wire); AT&T Comments at 8 (contending that the Commission should take steps to harmonize regulation of customer access to inside cable wiring with existing regulations governing customer access to inside telephone wiring); GTE Comments at 15 (cable inside wiring rules should be made consistent with regulations for telephony); Multimedia Development Comments at 10 (for cable wiring rules to work in the evolving market, parity with telephone wiring rules is necessary, to fullest extent possible); WCA Comments at 4-5 (urging use of telephone rules as a starting point for developing new inside wiring rules for broadband services, but broadband rules should depart from telephone rules where necessary to accommodate the practical differences between the "wiring topologies" used in each); Building Industry Consulting Comments at 4-5 (recommending single set of regulations for all wiring, including telecommunications and cable, and seeing no reason to change policy for inside telephone wire); Media Access/CFA Comments at 16 (supporting regulation of cable inside wiring under same model used for telephone inside wiring; rules allowing access to telephone inside wiring "have been a great success").

[581] Ameritech Reply Comments at 2-3 (common rules would reduce confusion, promote competition and increase customer choice); New York DPS Reply Comments at 4 (guidelines for inside wiring should evolve to model used for telephony in order to maximize consumer options and establish parity).

[582] AT&T Comments at 8.

207. WCA argues that precedent in the telephone context supports the transfer of cable inside wiring to property owners on installation.[583] WCA further argues that the Commission should adopt a rule providing that ownership of wiring not designated as "cable home wiring" in an MDU transfers automatically to the property owner upon installation. WCA argues that, to the extent owners have already acquired the wiring by state law or separate contracts with incumbent operators, such an action will have no impact.[584] WCA also claims that the cost of cable inside wiring lies primarily in installation, and the salvage value of the wiring pales in comparison to the cost of removal and restoration of the premises. WCA argues that a rule allowing operators to recover all of their inside wiring costs by including those costs in rates for basic service to MDUs or entering into separate service contracts for maintenance fees where wire is transferred at no cost will address any takings issues.[585]

208. Multimedia Development argues that the only reason video service providers seek to protect their ownership of inside wiring is to protect their customer base against entry by competitors.[586] Multimedia Development contends that we should require that title to cable inside wiring vest with the subscriber (or property owner for common wire in MDUs) upon installation, because the equipment has little or no residual value and is likely fully expensed for tax and regulatory purposes; Multimedia Development asserts that such a rule would not raise a takings issue if it were applied prospectively.[587] Multimedia Development further argues that existing signal leakage rules adequately protect the public and there is no evidence that the proposed changes would undermine that protection. Multimedia Development notes that CATA admits that many subscribers routinely alter their cable home wiring, but offers no evidence of how such alteration has or will cause leakage problems.[588]

209. DIRECTV seeks a presumption that the subscriber owns his or her cable inside wiring, and that the collective MDU community owns its common inside wiring. DIRECTV asserts that a cable operator could rebut these presumptions by providing proof that it had not recovered the investment cost of the wiring and that the salvage value of the wiring exceeds its unrecovered investment cost. DIRECTV recommends that where the cable operator is able to rebut these presumptions, the subscriber or MDU community should have the right to purchase the inside wiring or obtain access thereto prior to termination of service, arguing that our rules should allow for more than one provider to use the same wires in order

[583]WCA Comments at 17-19. *But see* ICTA Comments at 33 (Section 624(i) grants authority to prescribe rules for disposition *after* termination, but there is no statutory authority to prescribe rules for disposition of wiring *prior* to termination; forcing cable operators to sell wiring before termination would constitute a taking, and Congress has not granted the Commission authority to exact a taking).

[584]WCA Comments at 15-16.

[585]*Id.* at 20.

[586]Multimedia Development Comments at 17 and n.30.

[587]*Id.* at 18 and n.31 (citing *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)).

[588]Multimedia Development Reply Comments at 9-10.

to facilitate competition.[589] Alternatively, DIRECTV suggests that, where significant value remains in the wiring and the wiring is owned by the incumbent provider, a competitive service provider could be allowed to co-invest in the wiring by purchasing a portion of the unrecovered value from the incumbent.[590]

210. Property owners and managers claim that they have "no objection in principle" to allowing customers to install and maintain their own home wiring so long as the property owner retains the right to obtain access to the wiring and to control the type and placement of such wiring.[591] Furthermore, they contend that the building owner has, by contract, a superseding right to acquire or install any wiring. In any event, these commenters argue that tenants' rights to own, acquire or install wiring should be governed by state property law and the terms of the tenant's lease.[592]

211. In contrast, cable interests oppose granting subscribers the right to own or access their cable inside wiring prior to termination of service. These commenters argue that Section 624(i) does not provide for subscriber ownership of wiring before termination of service, and that the Commission otherwise lacks the statutory authority to impose it.[593] These commenters also argue that requiring pre-termination access would constitute an impermissible "takings" under the Fifth Amendment,[594] and would raise signal leakage concerns.[595] NCTA and Time Warner argue that while the Commission lacks the

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[589]DIRECTV Comments at 12. *But see* Marcus, et al., Reply Comments at 17-18 (DIRECTV's recommendation to share wires among providers is infeasible because it: (1) would require the addition of equipment that will substantially increase the likelihood of signal quality degradation and outages; (2) would destroy existing cable operators' ability to increase their channel and/or service offerings; and (3) assumes that only two providers will seek to provide broadband service).

[590]DIRECTV Comments at 12.

[591]Building Owners, et al., Comments at 44.

[592]*Id.* at 44-45; *see also* Wireless Holdings Reply Comments at 1 (MDU building owners should be considered the relevant subscribers in rental MDUs and should be allowed to purchase cable inside wiring).

[593]*See, e.g.*, CATA Comments at 12-13 (suggestion that cable operators be required to sell inside wiring to customers before termination is without legal or economic justification or authority, and there is no support for it in the record; Congress gave the Commission authority to regulate the disposition of inside wiring in narrow circumstance where subscriber voluntarily terminates service, not authority to create regulations designed to promote termination or create new property rights); Marcus Cable, et al., Reply Comments at 19 (Section 624(i) authorizes FCC regulation of disposal of wiring in very narrow circumstances; the rule cannot apply unless a subscriber has elected to terminate service, and then it only applies to wiring within the subscriber's home); TCI Comments at 4 (Commission's sole source of statutory authority over cable inside wire flows from Section 624(i), which sought to ensure the customer's opportunity to purchase inside wire within the premises when cable service was voluntarily terminated); Time Warner Comments at 26-27 (Section 624(i) applies only post-termination); *see also* ICTA Comments at 33 (Commission lacks statutory authority to require pre-termination access).

[594]*See, e.g.*, Time Warner Comments at 28; ICTA Comments at 33; NCTA Reply Comments at 9-13.

[595]*See, e.g.*, CATA Comments at 11 (Commission should determine the likelihood of leakage if subscribers have unfettered access to the cable; signal leakage is more important now since cable operators are about to offer high speed data services which are particularly sensitive to impulse noise migrating into system from subscriber premises); NCTA Reply Comments at 9-10 and fn. 16 (citing 1992 House Report at 119 (Congress was well aware of practical

statutory authority to force cable operators to cede control of home wiring at the point of installation, it could adopt incentives for cable operators to voluntarily cede control of home wiring to consumers upon installation.[596] Such incentives could include a relaxation of price regulation for inside wiring installation and maintenance fees and relaxation of signal quality and leakage regulations when an operator voluntarily allows pre-termination access.[597]

212. Cable interests also object to any analogy to our telephone inside wiring rules. CATA contends that analogies to telephone inside wiring rules are inapposite for cable wiring because access to telephone wiring was required in order to encourage competition for telephony CPE, while the Commission's goal for cable wiring is to encourage competition among video service providers.[598] NCTA argues that Congress did not intend operators to be treated as common carriers with respect to internal cable installed in subscriber homes, and that requiring cable operators to give up their facilities is inconsistent with their non-common carrier status.[599]

213. In addition, Time Warner maintains that a rebuttable presumption of subscriber ownership constitutes an impermissible taking, because ownership of the wiring would automatically shift to the consumer without compensation to the cable operator.[600] Time Warner contends that the 1992 Cable Act does not permit the promulgation of rules mandating that a cable operator yield ownership of home wiring prior to termination of service, even if just compensation is paid, and that Section 252(d)(2) of the 1996 Act presumes that the operator owns the wire over which it provides service, unless or until the operator cedes its ownership. According to Time Warner, a presumption that the subscriber owns the wiring will also discourage operators from installing wiring in the future.[601] Similarly, ICTA argues that an irrebuttable presumption of ownership would be unconstitutional. ICTA also argues that the Commission probably does not have authority to create a rebuttable presumption, but that operators could easily overcome such a presumption by ensuring that their contracts specify operator retention of ownership.

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implications of allowing subscriber access to continuously-activated coaxial wire and did not provide for it; signal leakage is a serious problem if wiring is improperly installed and maintained)).

[596]NCTA Reply Comments at 9; Time Warner Comments at 29-30.

[597]Time Warner Comments at 29-30. Time Warner also sees the negotiation of "social contracts," such as the one they have negotiated with the Commission, as a possible way to achieve this goal. *Id.*

[598]CATA Comments at 10; *see also* Marcus Cable, et al., Reply Comments at 15-16 (no rationale for adopting telephone inside wire rules for cable wiring; telephone rules were adopted when telephone service was delivered over simple, uniform network, using equipment completely developed and regulated, while cable service is in a state of dynamic growth, and the imposition of rules for a "static technology" in the cable context would stifle technological growth); TCI Comments at 3-4 (nothing in the 1996 Act or its history contemplates harmonization of telephony and cable inside wiring rules; Congress specifically addressed and rejected regulatory harmony with respect to physical plant).

[599]NCTA Comments at 13 (citing 1992 House Report at 118).

[600]Time Warner Reply Comments at 43.

[601]*Id.* at 42-44.